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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 371

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*,

v.

PHILCO CORPORATION, *Respondent*.

MOTION BY GERITY BROADCASTING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BRIEF OF GERITY BROADCASTING COMPANY, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Gerity Broadcasting Company requests the Court to grant it permission to file a Brief Amicus Curiae in support of the Petition of National Broadcasting Company for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Gerity Broadcasting Company is the licensee of Television Station WNEM-TV in Bay City, Michigan, and of AM Station WABJ in Adrian, Michigan. It has no other business interests. However, James Gerity, Jr., the sole stockholder of Gerity Broadcast-

ing Company, has extensive business interests in the non-broadcast field. In particular, he is a stockholder and director of Hammond-Standish Company, a meat packing company in Michigan, and he is also a stockholder and director of the Commercial Savings Bank of Adrain, Michigan. Both of these companies utilize the facilities of WNEM-TV or WABJ for the purpose of advertising and promoting those companies. The meat packing company and the bank are in competition with other companies within the service area of WNEM-TV and WABJ.

Gerity Broadcasting Company is interested in the instant proceeding because the opinion of the Court below holds that a company which is not in any way directly or indirectly engaged in the broadcasting business, has standing to file a Protest against the grant by the Federal Communications Commission of an application for renewal of licenise of a broadcast station simply because the would-be Protestant is engaged in the business of manufacturing and selling products which are competitive with similar products manufactured and sold by the parent company of the broadcast licensee.

To understand the basis of our concern, a brief description of Federal Communications Commission procedure should be useful. Under the Communications Act of 1934, as amended, radio broadcast equipment may not be utilized for broadcast purposes without a license therefor granted by the Commission pursuant to a written application filed by the applicant. Once an application is granted, any change in equipment used or in the location of the antenna requires another application. In addition, applications for re-

newal of license must be filed at least every three years and at times at more frequent intervals.

Under Section 309(c) of the Communications Act, a Protest may be filed against a grant of any of the above applications. When a Protest is filed by a qualified person, the Commission must either set same for oral argument or designate it for evidentiary hearing. The great majority of Protests require an evidentiary hearing. Although Section 309(c) provides that hearings on Protests shall be expedited, the numerous procedural steps[1] that must be taken by the Commission and the crowded condition of the Commission's docket make it extremely unlikely that a final decision on a Protest case can be rendered in less than a year or a year and a half.

As the licensee of broadcast stations, Gerity Broadcasting Company is keenly aware of the harassment and opportunities for delay which Section 309(c) con-

[1] These steps are as follows:

1. A Protest may be filed within 30 days of the grant of an application without a hearing.
2. The Commission must act on the Protest within 30 days of filing.
3. A hearing is held before an Examiner.
4. The parties are permitted to file Proposed Findings with the Examiner.
5. The Examiner issues an Initial Decision.
6. The Parties are permitted to file Exceptions to the Initial Decision.
7. Oral Argument must be heard by the Commission en banc at the request of any party.
8. The Commission issues a Final Decision.
9. A Petition for Rehearing may be filed by any party within 30 days.
10. The Commission must issue a written opinion disposing of the Petition for Rehearing.

fers upon its competitors. Several of its applications have been grievously delayed by the filing of such Protests, to the detriment of its service to the public. Thus far, however, these Protests have been filed by licensees of broadcast stations. If the opinion of the Court below is permitted to stand, the opportunity for harassment or delay will be extended to any of Mr. Gerity's competitors in the non-broadcast field. We submit that this result could not have been intended by Congress.

Gerity Broadcasting Company requests the opportunity to file a Brief Amicus in this proceeding because the deleterious effect of the principles announced by the Court below affect not only the National Broadcasting Company but also Gerity Broadcasting Company and other licensees similarly situated. We therefore respectfully request that the Court accept the attached Brief Amicus Curiae.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS CURIAE

Gerity Broadcasting Company is the licensee of Television Station WNEM-TV, Bay City, Michigan and of AM Station WABJ, Adrain, Michigan. Its sole stockholder is James Gerity, Jr., who has extensive non-broadcast interests. Some of the non-broadcast companies in which he has an interest utilize the facilities of WNEM-TV and WABJ for the purpose of advertising and promoting the companies. As we read the opinion of the Court below in the instant case, non-broadcast companies which are competitive with those non-broadcast companies in which Mr. Gerity has

an interest, have standing to file Protests against action of the Commission granting applications of Gerity Broadcasting Company for renewal of license and probably other types of applications. Gerity Broadcasting Company has been hampered in the past in its efforts to provide maximum service to the public its stations serve because of the delays in obtaining authorizations caused by the filing of Protests by licensees of competitive broadcast stations. If the opinion of the Court below is permitted to stand, the doors will be opened wide to an indeterminate number of persons who will be given an opportunity to harass the broadcast operations of Gerity Broadcasting Company—and of other companies similarly situated—in order to protect competitive positions in industries having no relation to broadcasting. We believe that the opinion of the Court below sanctioning such a result is wrong and should be set aside by this Court.

ARGUMENT

The instant case involves a Protest by the Philco Corporation against the action of the Federal Communications Commission in granting the application of National Broadcasting Company for renewal of the station license of Television Station WRCV in Philadelphia. Philco filed its Protest under Section 309(c) of the Communications Act of 1934, as amended, asserting *inter alia* that it was a "party in interest" within the meaning of that Section by virtue of the fact that it is a manufacturer competing with RCA (the parent company of NBC) in the sale of its products.[1] The

[1] Philco also relied upon its status as an advertiser on television facilities as an additional ground upon which to base its standing. The Court below did not feel it necessary to rule upon this claim as a basis for standing.

Commission dismissed the Philco Protest holding that it was not a party in interest. The Court below, with Judge Madden dissenting, held that Philco was a party in interest and remanded the case to the Commission to consider the Protests on the merits.

At the outset, it should be pointed out that Philco in complaining of the Commission's action granting the WRCV renewal is not seeking to protect or vindicate any rights or privileges personal to it. If it is permitted to participate in the hearing, the Commission will not be called upon to consider the nature of the injury which Philco is allegedly suffering from the competitive efforts of RCA. Rather, the subject matter of the hearing will be confined to questions of whether NBC is qualified to operate WRCV and whether a grant of the WRCV renewal would serve public interest, convenience, or necessity. So far as the usual concepts of "case or controversy" are concerned, Philco's interest in these matters is the same as that of any private citizen. Absent statutory provisions conferring a special status upon it—that of a private attorney general—its appeal in this case must fail for want of "case or controversy".

Philco claims that it does have a special status conferred upon it by Section 309(c) of the Communications Act of 1934, as amended. That Section was first introduced into the Communications Act in 1952.[2] It provides that an application which is granted without a hearing by the Commission shall remain subject to protest for a 30-day period. Within that period any "party in interest" is permitted to file a Protest

[2] Public Law No. 554 (82nd Cong.) 66 Stat. 715; amended by Public Law No. 391 (84th Cong.), 70 Stat. 3.

against such grant. If the Protest meets certain qualifications, the Commission is required to order a hearing on the application.[3]

The adoption by Congress of Section 309(c) was over the vigorous objections of the Commission. It feared that the term "party in interest" was so broad that it would permit a host of parties with no legitimate interest to hamstring the Commission's processes. The Congress, while desirous of having the Protest provision in the Act, was anxious to restrict the use of the provision to those with legitimate interest. To accomplish this result, it confined the term "party in interest", to the interpretation of somewhat similar language in the Communications Act which had heretofore been adopted by two Supreme Court opinions. The Report of the Senate Committee on Interstate and Foreign Commerce accompanying the bill makes this clear. It reads as follows (S. Rep. No. 44, 82nd Cong., 1st Sess. at p. 8):

> "Fear has been expressed that use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made. The Committee does not so construe the term 'party in interest;' 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the KOA case (319 U.S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders Case (309 U.S. 470)."

[3] Under certain conditions, the effectiveness of the grant must be suspended pending the outcome of the hearing. This latter requirement does not apply to renewals.

This quotation makes it clear that only two classes of private attorneys general are comprehended by the phrase "parties in interest". The first class is easily defined. It comprehends existing radio stations which would suffer electrical interference to their protected operations as defined by the Commission's Rules and Regulations. In the *KOA* case (*Federal Communications Commission* v. *National Broadcasting Co.* (KOA), 319 U.S. 239) this Court held that a station's license incorporates therein all of the Commission's Rules and Regulations relating to the station's normally protected service area and interference thereto. Therefore, any new application which would cause interference to such operation is a modification of the station's license and entitles the licensee to intervene in any hearing held on the application proposing to cause the interference.

The second category (*Federal Communications Commisison* v. *Sanders Bros. Radio Station*, 309 U.S. 470) is not so precisely defined as the first one. The *Sanders* case involved a hearing ordered by the Commission on an application for a new station. An existing station in the same market alleging that the grant of the new station would cause economic injury to it, was permitted to participate in the hearing. When the new application was granted, the existing station appealed. The Commission contended that the appellant had no standing to file its appeal since the basis of the appellant's cause of action was injury from competition, and—according to the Commission's argument—the Communications Act did not protect existing stations against competiton. This Court agreed with the Commission that an existing station is not entitled to protection against competition. However,

it disagreed with the Commission on the question of standing, holding that the existing station had standing—under the provision of Section 402(b)(2) of the Act conferring standing upon persons "aggrieved or whose interests are adversely affected" by Commission action—to appeal to the Court for the purpose of calling its attention to any errors of law committed by the Commission in making the grant. The Court disagreed with the Commission's contention that the appellant's standing was inconsistent with the constitutional requirement of "case or controversy," holding, in effect, that the quoted provision of Section 402(b)(2) resulted in creating a new class of litigant, private attorneys general, who were thus enabled to bring to the Court's attention errors of law committed by the Commission in granting applications.

Although *Sanders* appears to be a relaxation of the strict requirements of case and controversy, there is no reason to believe that the Court opened the doors wide for any meddler to inject himself into Commission proceedings. The role of private attorney general is not given to meddlers. Of necessity, it must be restricted to those with a legitimate interest in the action of the Commission. The Senate Committee said so in so many words (See p. 4, *supra*). There is every reason in logic and policy to hold that only persons holding licenses from the Commission can qualify as having legitimate interest as private attorneys general.

It should be remembered that Section 309(e) of the Communications Act is part and parcel of a statutory scheme relating to the operation of radio stations. The Commission is required to grant applications for radio stations only if they will serve public interest, conven-

ience or necessity. Licensees of radio stations are engaged in a private business, but it is a private business which obligates them to operate in the public interest. Since licensees have the obligation to operate in the public interest, they have a legitimate interest in any action of the Commission granting applications to stations, if such action has any bearing upon their continued ability to operate in the public interest. The two cases cited in the Senate Report fall into this category. In the *KOA* case this Court held that licensees have standing to intervene in proceedings on applications for new stations involving interference to existing stations. The basis for this holding is that the purpose of the Act is to incorporate into the license the provisions of the Commission's Rules and Regulations relating to service contours and interference. Hence, a licensee has the right to protect that service area and his obligation to serve the interests of the public residing in such area. The *Sanders* case states that even though a station licensee must operate in a free competitive market, he is privileged to resist the grant of new applications which would affect the economics of his operation when he can show that the grant of the new application is against the public interest or would prevent the existing station from operating in the public interest. An existing station in this type of situation is not a mere volunteer. Being engaged in a business which must serve the public interest, he is protecting that status when he objects to the grant of a new application. His participation is related to the public interest and is an integral part of the scheme of the Communications Act designed to see to it that broadcasting is carried on in the interest of the public.

We do not mean that the right to file a Protest under Section 309(e) is limited under all circumstances to licensees of radio stations. What we do contend is that this limitation is required when the person seeking to employ Section 309(e) is not seeking to protect a legal right personal to him, but instead claims status as a private attorney general. Where the Protestant is seeking to protect his own legal rights, traditional concepts of "case or controversy" are present and are effective guarantees that only those with a legitimate interest will participate in Commission proceedings. It is not necessary or appropriate to catalogue all types of cases which might fall into this category. Suffice it to point out that action of the Commission in granting an application on condition that the applicant abrogate an existing contract with the Protestant would, under well-recognized concepts, entitle the Protestant to invoke the aid of a court to protect his rights against improper interference by the Commission.[4] Similarly, action of the Commission granting an application for transfer of license to a third person, when the would-be Protestant urges that the licensee is under a contractual obligation to transfer the station to him, would be an appropriate occasion for a Protest since the Commission's action would adversely affect or interfere with the contractual rights of the Protestant.[5] Other instances could be cited but they would be merely cumulative examples of the basic principle.

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[4] Cf. *Columbia Broadcasting System* v. *United States*, 316 U.S. 407. Cf. also *Regents of Georgia* v. *Carroll*, 338 U.S. 586.

[5] *Granik* v. *Federal Communications Commission*, 234 F. 2d 682 (App. D.C. 1956).

Philco does not fit any category of "party in interest" which has been discussed. It does not assert any rights which have been violated by the Commission. It does not allege that the Commission's action constitutes an improper interference with contractual relations or property rights of Philco. It cannot qualify as a private attorney general because the Commission's action in no way has any bearing upon its ability to continue operating in the public interest. Its interest is no different from that of any other private citizen. To hold that it has standing in this case would open the door for interference in Commission processes by a host of persons with no legitimate interest in this public-service industry. To do so would be inconsistent with the Congressional purpose in enacting Section 309(e).

CONCLUSION

For the foregoing reasons, it is requested that the Petition For Writ of Certiorari be granted.

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